We agree with the learned judge that "issue estoppel" can arise even where a plea of *res judicata* cannot be established because the causes of action are not the same.

Halsbury's Laws of England – 4th Ed. Vol. 16 paragraph 1530 succinctly sets out the law, which is cited hereunder:

"A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proceedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out."

It adopts the very words of Lord Guest's speech in *Carl-Zaiss – Stifung* v. *Rainer And Keeler Ltd. & Others (No. 2)*,[1] referred to by the learned judge in his judgment.

We need only deal with the only other point taken up on behalf of the appellants by Mr. Chandran. It is clear to us that learned counsel has misread the judgment because his contention here is that the learned judge had erred in law in holding that even if the first defendant was given unconditional leave to defend (in K.L. High Court C.S. No. C1129 of 1981), the granting of such unconditional leave to defend to the first respondent/first defendant operates to estop the appellant from proceeding with an application for summary judgment in the second action *i.e.* C.S. No. C236 of 1981. What the learned judge did say in his judgment was, and we quote. "No doubt the giving of leave to defend cannot be said to be a final judgment but in respect of issue estoppel the question is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of with finality"

We would respectfully agree with the learned judge's statement of the law aforementioned, having regard to the passage in *Halsbury's* we had considered earlier and to the authorities cited therein.

As is stated at paragraph 1527 of the same volume of *Halsbury's*, the doctrine of *res judicata* is not a technical doctrine applicable only to records, but is a fundamental doctrine of all courts that there must be an end of litigation. *Interest reipublicae ut sit finis litium.*

According, this appeal is dismissed with costs here and below. Deposit to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Adnan Sundra & Low; Azman, Davidson & Co.*

LEONG SIEW HOONG v. PUBLIC PROSECUTOR

[O.C.J. (K.C. Vohrah J.) November 17, 1987]

[Kuala Lumpur – Federal Territory Criminal Application No. CR 54-31-87]

Criminal Procedure – Bail – Application for – Charge of trafficking in dangerous drugs – Punishment of death – Gross weight of drugs given – Whether weight of drugs relevant to application – Principles applicable – Dangerous Drugs Act 1950, ss. 37(da), 39B & 41B.

The accused was charged with the offence of trafficking in dangerous drugs, an offence under section 39(B) of the Dangerous Drugs Act 1950 and punishable with death. The weight of the drugs stated in the charge was the gross weight.

The accused applied for bail pending the disposal of his case. Counsel for the accused relied on *Ho Chuan Chong* v. *Public Prosecutor*[1] and argued that bail should be granted. The main argument of counsel was that the nett weight of the drugs may well be below the requirements of the charge and therefore the accused was not caught under the restriction relating to bail in section 41B of the Dangerous Drugs Act 1950.

Held, dismissing the application: (1) this case did not essentially turn on the weight of the heroin specified in the

charge. The crucial question was what is the offence the accused is charged with;

(2) since the offence he has been charged with under the Act is punishable with death, then it falls within the provisions of section 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death;

(3) that the nett amount of the dangerous drugs is specified in a charge for trafficking does not mean that if an accused is convicted for an offence of trafficking in that drug, he would not be sentenced to death if the amount of the dangerous drug involved in the trafficking is less then the amount specified for the relevant drug in paragraph (i), (ii), (iii) or (iv) of section 37(da), assuming he was in possession of the drug. These paragraphs merely raise presumptions of trafficking in the relevant drug and the prosecution may rely on the relevant provision if the accused is found in possession of the drug to raise a case of trafficking in that drug until the contrary is proved by the accused;

(4) the reliance by counsel for the accused on the case of *Ho Huan Chong*(1) and on Article 5 of the Federal Constitution was misconceived.

Case referred to:

(1) *Ho Huan Chong* v. *Public Prosecutor* [1980] 2 M.L.J. 289.

BAIL APPLICATION.

T.Y. Teh for the applicant.

Zaini bin Abdul Rahman (Deputy Public Prosecutor) for the Public Prosecutor.

K.C. Vohrah J. (delivering oral judgment): This is an application for bail for the accused pending disposal of the case against him. The accused was produced before a magistrate charged for an offence under section 39B(1) of the Dangerous Drugs Act 1950 (the Act) punishable, under section 39B(2), with death. It is not disputed that the charge against him of trafficking in a dangerous drug, heroin, disclosed not the nett weight but the gross weight of heroin he was alleged to be trafficking in. The gross amount was put in the charge as 37 grammes of heroin. The magistrate before whom the accused was produced refused him bail and therefore application was made to the High Court for bail pending the disposal of the case.

Counsel for the applicant relied on the judgment of Ajaib Singh J. in *Ho Huan Chong* v. *Public Prosecutor*(1) and on Article 5(1) of the Federal Constitution to argue that the accused should be allowed bail. And he argued, and I would like to put the gist of his argument here, that since the nett weight of heroin, after a chemist's report is received, could well be below the presumptive amount of 15 grammes of heroin under section 37(da) of the Act, or, for that matter, below the amount of 5 grammes of heroin and therefore not falling under section 39A (under section 39A(a), offences falling thereunder and involving 5 grammes or more of heroin would attract, *inter alia*, a sentence of imprisonment of not less than five years) the accused is not caught under the restriction relating to bail in section 41B of the Dangerous Drugs Act 1950; the gross amount of heroin as indicated in the charge is an uncertain amount and therefore applying the case of *Ho Chuan Chong*(1) the accused should have been given bail; also, since it is necessary for the exact amount of the heroin to be indicated, it has perforce to be specified in accordance with law and no such amount being given the accused had been deprived of bail and that is not in accordance with law as Article 5 of the Federal Constitution enjoins that no person "shall be deprived of ... personal liberty save in accordance with law."

It is well known that indeed most charges involving drug offences do not indicate the exact weight of the drugs alleged to have been found on accused persons or in which they are alleged to have trafficked on the day the accused are charged. It is also a well known fact that drugs found on the accused or in which the accused are alleged to be trafficking are not in their pure form and therefore substances containing the drugs which have been seized need to be sent to the chemist for qualitative and quantitative tests. It is within judicial knowledge that there are arrests made virtually everyday in respect of various drug offences and invariably the drugs seized in the cases are sent to government chemists for analysis. The government chemists are clearly inundated with the work of analysing such drugs and there does not appear to be any respite for them. There is therefore a time lag between the time an accused is charged with whatever drug offence on the basis of a gross amount of the dangerous drug and the time the investigating officer receives the chemists' report of the nett amount of the dangerous drug whereupon the amount is inserted into the charge. Ideally, the chemists' report should be available within a few weeks but I am not in a position to say anything more on the matter except to draw attention to what Ajaib Singh J. has stated in the case of *Ho Huan Chong*(1) at pp. 289 and 290.

This case, however, does not essentially turn on the weight of the heroin specified in the charge. In the present case, the amount indicated in the charge is 35 grammes of heroin, no doubt the gross weight. But the crucial question in this case is,

"What is the offence the accused is charged with?" He is charged with the offence of "trafficking" in a dangerous drug, heroin, an offence punishable, under section 39B(2), with death. Given the definition of "trafficking" in section 2, it does not matter in what amount of the dangerous drug an accused is charged with trafficking – it is trite law that if he trafficked in one gram of dangerous drug, the sentence is still death.

Since the offence he has been charged with under the Act is punishable with death, then it falls within the provisions of section 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

That the nett amount of the dangerous drug is specified in a charge for trafficking does not mean that if an accused is convicted for an offence of trafficking in that drug, he would not be sentenced to death if the amount of the dangerous drug involved in the trafficking is less than the amount specified for the relevant drug in paragraph (i), (ii), (iii), (iiia) or (iv) of section 37(da), assuming he was in possession of the drug. These paragraphs merely raise presumptions of trafficking in the relevant drug and the prosecution may rely on the relevant provision if the accused is found in possession of the drug to raise a case of trafficking in that drug until the contrary is proved by the accused.

To my mind therefore, the reliance by counsel for the applicant on the case of *Ho Chuan Chong*(1) and on Article 5 of the Federal Constitution is misconceived and I dismiss the application for bail.

Application dismissed.

Solicitors: *Manjit Singh Sachdev & Co.*

PUBLIC PROSECUTOR v. LIIK CHING KWONG

[A.Cr.J. (Chong Siew Fai J.) August 21, 1987]

[Sibu – Criminal Appeal No. 23 of 1983]

Criminal Procedure – Road traffic accident – Statement to police sergeant – Admissibility of – Charge of driving without due care and attention – Failure to render assistance to the injured person – Failure to stop after accident – Road Traffic Ordinance 1960 – Criminal Procedure Code (FMS Cap. 6), ss. 112 & 113.

The accused was charged with three offences. The first charge was for driving without due care and attention. The second charge was for failing to render assistance to the injured person and the third charge was for failing to stop his vehicle after being involved in a road accident. All the charges arose out of one and the same transaction.

The accused was acquitted on the first charge but was convicted on the second and third charges. He was fined $500 on the second charge and fined $80 on the third charge. In addition, he was suspended from driving for one year and his driving licence indorsed.

The prosecution appealed against the acquittal on the first charge. The accused cross-appealed against the convictions on the other two charges.

The prosecution evidence was based mainly on a statement made by the accused to a police sergeant.

Held, dismissing the appeal of the prosecution and allowing the accused's cross-appeal: (1) the statement made by the accused to the police sergeant was wrongly admitted because:

(a) it was made to a police sergeant and not to an officer of or above the rank of an inspector as required under the Criminal Procedure Code, and

(b) the making of the statement contained an element of threat;

(2) the convictions were set aside and the fines were refunded;

(3) the order of suspension of the accused's driving licence and the indorsement on the licence were set aside.

Cases referred to:

(1) *Jayaraman & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 306, 311-312.
(2) *Abdul Ghani bin Jusoh & Anor.* v. *Public Prosecutor* [1981] 1 M.L.J. 25.
(3) *Public Prosecutor* v. *Ng Goh Weng & Anor.* [1979] 1 M.L.J. 127.
(4) *R.* v. *Smith* [1959] 43 Cr. App. R. 121, 126.
(5) *SJF (an infant)* v. *Chief Constable of Kent, ex parte Margate Juvenile Court* Times, 17 June 1982.